JUL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1074

CHARLES GERSH,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Charles Gersh, one of the defendant appellants in the case of *United States of America* v. *James LaFazia, et al.*, respectfully prays for a re-hearing by the Court of this Court's decision of June 17, 1963 denying the petitioner's application for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner was convicted of transporting stolen motor vehicles in interstate commerce and of conspiracy in violation of 18 U. S. C. 2312, 371, 2.

Petitioner was sentenced to serve three and one-half years. He was continued on bail during the pendency of appellate proceedings.

Petitioner respectfully requests a reconsideration by this Court of its decision denying his application upon the following grounds:

First: That he is an innocent victim having had no connection with the offenses charged.

Second: That the Trial Court improperly permitted hearsay testimony as to payment of money for wrecked automobiles (October 25, page 481). The testimony showed that petitioner Gersh was in the business of selling auto wrecks. The introduction of hearsay testimony as to payment to petitioner of moneys, to wit: $4,600 for automobiles undoubtedly influenced the determination of his complicity. Proof of such remote kind is not to be received as an element of the requirement that guilt be shown beyond a reasonable doubt. Judicial disapproval of hearsay is of such commonplace occurrence as scarcely to require the citation of authority. *Hopt v. Utah*, (1884) 110 U. S. 574.

Third: An important prosecution witness who admitted he did not know petitioner was allowed, over objection (Nov. 15, pp. 2-4, 120) to testify as to a number of telephone conversations with him damaging indeed and suggesting conscious-ness of guilt. This testimony was permitted to be received by the jury notwithstanding the fact that there was an absence of proof of the identity of the speaker. The testimony was wholly incompetent since "the witness must recognize the declarant's voice." L. Hand, Circ. J., in *United States v. Frankel* (C. C. A. 2, 1933). Identification, however slight, is necessary. In the absence of identification, testimony was wholly prejudicial. *Lewis v. United States* (C. C. A. 6, 1926), 11 F. 2d 745.

Fourth: Petitioner respectfully states that the effect of the errors herein described warrants a reconsideration

especially where the case as shown by the record is "a close one". *Bibo* v. *United States*, 328 U. S. 633; *United States* v. *Tomaiolo*, 249 F. 2d 683.

FIFTH: The government's case was based upon inferences and not upon direct evidence tending to connect petitioner with the conspiracy. Petitioner was swept within the dragnet of conspiracy with the result that it brought about a hostile atmosphere culminating in his conviction. *United States* v. *Falcone* (C. C. A. 2, 1940), 109 F. 2d 578 (311 U. S. 205). In the latter case Mr. Justice Stone pointed out that knowledge of the conspiracy could not be inferred "from the casual and explained meetings of respondents with others who were convicted as conspirators."

CONCLUSION

The Petition for a Re-rearing Should Be Granted.

Respectfully submitted,

JOSEPH BIALL,
Attorney for Petitioner Charles Gersh.

CERTIFICATE

I, JOSEPH BIALL, do hereby certify that this petition for rehearing is made in good faith and not for the purpose of delay, and in my judgment, upon sufficient grounds.

JOSEPH BIALL.

Dated: New York, New York,
July 5th, 1962.